



March 8, 2001

Mr. Craig H. Smith
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Texas Workers' Compensation Commission
4000 South IH 35
Austin, Texas 78704

OR2001-0911

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144527.

The Texas Workers' Compensation Commission (the "commission") received a request for all files and documents related to the process of reviewing the commission's 1996 Medical Fee Guideline (the "MFG") and considering updates and alternatives to the MFG. The commission subsequently received a request from another requestor for fourteen categories of information related to the Request for Qualification (the "RFQ") issued by the commission to independent firms to provide services to develop, revise, and maintain Medical Fee and Treatment Guidelines for the commission. You inform us that the information responsive to the second request for which you seek a decision from this office is the same information submitted as Attachment I with respect to the first request. As information responsive to the second request is encompassed by the first request, and as you raise identical exceptions for withholding the information that is responsive to both requests, we are consolidating both requests under the identification number listed above. You state that the commission will release approximately seven boxes of documents and 300 megabytes of information in electronic format, as well as the document in Attachment H, to the first requestor for inspection. You state that you will also release some responsive information to the second requestor. You further state, however, that there are no documents responsive to certain categories of information requested by the second requestor.¹ Moreover, you contend that other responsive information is excepted from required public

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

disclosure pursuant to sections 552.101, 552.103, 552.104, 552.107, 552.108, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

First, we address the first requestor's letters to this office dated December 26, 2000, and February 15, 2001. In these letters, the first requestor contends that the commission failed to submit its request for a decision to this office within ten business days of its receipt of his written request for information. The requestor asserts that this failure constitutes a waiver of any exceptions to the required disclosure of the requested information.

Section 552.301(b) of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. The commission received the written request for information on November 30, 2000. Thus, the deadline for the commission to submit a request for a decision to this office was December 14, 2000. Although the commission's letter requesting a decision is dated December 15, 2000, our records indicate that the letter was faxed to, and received by, this office on December 14, 2000. Therefore, we conclude that the commission met its ten-day deadline for requesting a decision from this office.

We now turn to your claimed exceptions with respect to the submitted information. First, we note that in your letter dated December 15, 2000, you claim that the requested information is exempt from disclosure under section 552.103. You state that "because the 1996 Medical Fee Guidelines is the subject of litigation, the litigation exception . . . also applies." Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

²You state that Attachments C and E contain representative samples of responsive information. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that the governmental body seeks to withhold. To sustain this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. As you have failed to provide any facts or documents to support either element of this test, we find that the requested information is not excepted from disclosure under section 552.103.

Next, you claim that the documents in Attachment A are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.*

We agree that you may withhold much of the information in Attachment A under section 552.107(1). We note, however, that some of the information in Attachment A is not excepted under section 552.107(1) for one or more of the following reasons: (1) the information was not communicated to or from an attorney; (2) the information is purely factual information communicated by an attorney (i.e., not legal advice or opinions); (3) the information was communicated between an attorney and a third party not acting as the client or a representative of the client; and (4) the information consists of handwritten notes without any indication as to who made the notes or whether the information was communicated. Accordingly, we have marked the information in Attachment A that may not be withheld under section 552.107 and must be released to the requestor.

Next, you contend that the documents in Attachments B, E, and G, as well as certain documents in Attachment I, contain proprietary information and are excepted from public disclosure under section 552.110 of the Government Code. When a third party’s proprietary rights are implicated, section 552.305(d) requires a governmental body to notify the party of the request for an attorney general decision. You notified St. Anthony’s Publishing, the American Society of Anesthesiologists, the American Dental Association, the American Medical Association, and Ingenix of these requests. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain

circumstances). As of the date of this letter, none of the entities have submitted to this office their reasons explaining why any of the submitted documents in Attachments B, E, G or I should not be released. Therefore, we have no basis to conclude that the responsive information is excepted from disclosure. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

Nonetheless, you argue that the submitted documents are excepted under section 552.110 because the release of the information might compromise the future ability of *the commission* and other governmental bodies to obtain competitive bids. This argument, expressing the commercial interests of *the commission*, evidently relies on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Circuit Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App. - Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires that the *third party* whose information is at issue make a specific factual or evidentiary showing that disclosure of its information would likely result in substantial competitive injury to itself. See also Open Records Decision No. 661 at 5-6 (1999). As there has been no such showing here, we conclude that the requested information may not be withheld under section 552.110. As you raise no other exception with respect to Attachment B, it must be released to the requestor in its entirety.

You then argue that the documents in Attachments C, D, E, F, and G, as well as certain documents in Attachment I, should be withheld from public disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office re-examined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the advice, opinion, or recommendations. Open Records Decision No. 615 at 4-5 (1993). But a preliminary draft of a policymaking document that has been released or is intended for release in final form

is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

You state that the documents responsive to the request include "drafts of the MFG ground rules" and "internal memoranda, correspondence, notes and other communications reflecting the internal deliberation of policymaking issues regarding development of the MFG revisions." After careful review of the documents submitted under Attachments C, D, E, F, G, and I, we find that the documents in these Attachments generally reflect the policymaking process of the commission with respect to the revisions to the MFG. Therefore, we agree that the draft documents in Attachment C, D, E, F, G, and I that have been or will be released in final form may be withheld under section 552.111. However, any factual information severable from the advice, opinion, or recommendations that is not included in the final form of any such draft must be released to the requestor. With respect to the documents in Attachments C, D, E, F, G and I that are not draft documents, we agree that some of the information contained therein constitutes advice, opinion, and recommendations and, therefore, may be withheld under section 552.111. We have marked the information in Attachments C, D, E, F, G, and I that may be withheld under section 552.111. However, with respect to the remaining information in these documents, we are unable to discern, nor have you demonstrated that the information constitutes advice, opinion, or recommendations. Therefore, such information may not be withheld under section 552.111. The remaining documents in Attachments C, D, E, F, and G that are not marked to be withheld must be released to the requestor.³

You next assert that documents in Attachment I relate to an RFQ and are excepted from disclosure based on section 552.104 of the Government Code. Initially, we note that Attachment I contains information that falls within the purview of section 552.022(a)(3). Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from required disclosure unless it is made expressly confidential by other law. Attachment I includes executed contracts falling under this category of information. While you contend that these contracts are excepted under sections 552.104 and 552.111, these exceptions are discretionary and do not constitute "other law" for purposes of section 552.022.⁴ Moreover, as discussed above, there has been no showing that the information in Attachment I is excepted from disclosure under section 552.110 of the Government Code. You have not

³As discussed below, those documents in Attachment I that are not marked to be withheld under section 552.111 are to be withheld under section 552.104. Only those documents in Attachment I that are marked to be released must be released to the requestor.

⁴Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

indicated, nor are we aware of, any other law that would make this information confidential. Therefore, we find that certain contracts contained in Attachment I are public information not excepted from public disclosure under section 552.022(a)(3). We have marked these contracts, which must be released.

Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990). In this case, you inform us that the contract has not yet been awarded and that the documents reflect information regarding the RFQ responses and ongoing contract negotiations. We conclude that most of the information in Attachment I is bid information excepted from disclosure based on section 552.104 until such time as the contract is awarded. Thus, the unmarked information in Attachment I may be withheld under section 552.104 until the bidding process is completed and all the contracts responsive to the RFQ have been awarded and finalized. We have marked the information in Attachment I that is not excepted by either section 552.111 or 552.104 and must, therefore, be released to the requestor.

You state that Attachment J consists of copies of written decisions of the State Office of Administrative Hearings that were maintained in files related to the development of the MFG for reference purposes. You contend that some of these copies contain unredacted information that is confidential by law under section 402.083 of the Texas Labor Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 402.083 of the Labor Code provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle." This office has interpreted section 402.083 to protect only that "information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers' compensation claims." Open Records Decision No. 619 at 10 (1993). Therefore, we find that the information in Attachment J derived from a claim file that explicitly or implicitly discloses the identities of employees who filed workers' compensation claims is confidential under section 402.083 of the Labor Code and must be withheld from disclosure under section 552.101 of the Government Code. All other information in Attachment J must be released to the requestor.

We further note that Attachment F contains certain information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who

request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission must withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The commission may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked examples in Attachment F of the type of information that must be withheld under section 552.117 for employees that made timely elections under section 552.024.

Finally, you contend that the information in Attachments C, D, E, F, and G is excepted from disclosure under the principles set out by the Texas Supreme Court in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In *A & T Consultants*, the Texas Supreme Court held that the comptroller could withhold from disclosure audit papers pursuant to section 552.108 to protect the comptroller's interest in enforcing the tax laws. *Id.* at 677. Thus, you seem to claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. You have not, however, provided any facts or documents that would establish that any of the requested information is excepted from disclosure under section 552.108. Thus, the information in Attachments C, D, E, F, and G is not excepted from disclosure under section 552.108.

To summarize,

- 1) The requested information is not excepted from disclosure under section 552.103.
- 2) We agree that you may withhold much of the information in Attachment A under section 552.107(1). We note, however, that some of the information in Attachment A is not excepted under section 552.107(1) and must be released to the requestor as marked.
- 3) The requested information may not be withheld under section 552.110. As you raise no other exception with respect to Attachment B, it must be released to the requestor in its entirety.
- 4) The draft documents in Attachments C, D, E, F, G and I that have been or will be released in final form may be withheld under section 552.111. However, any factual information severable from the advice, opinion, or recommendations that is not included in the final form of any such draft must be released to the requestor. With respect to the documents in Attachments C, D, E, F, G and I that are not draft documents, we have marked the information that may be withheld under section 552.111. The remaining information in Attachments C, D, E, F, and G that is not marked to be withheld must be released to the requestor.
- 5) Certain contracts contained in Attachment I are public information not excepted from public disclosure under section 552.022(a)(3). We have marked these contracts, which must be released. Most of the information in

Attachment I, however, is bid information. Thus, the remaining unmarked information in Attachment I may be withheld under section 552.104 until the bidding process is completed and all the contracts responsive to the RFQ have been awarded and finalized. We have marked the information in Attachment I that is not excepted by either section 552.111 or 552.104 and, therefore, must be released to the requestor.

- 6) The information in Attachment J that is derived from a claim file and explicitly or implicitly discloses the identities of employees who filed workers' compensation claims is confidential under section 402.083 of the Labor Code and must be withheld from disclosure under section 552.101. All other information in Attachment J must be released.
- 7) We have marked examples in Attachment F of the type of information that must be withheld under section 552.117 for employees that made timely elections under section 552.024.
- 8) Finally, the information in Attachments C, D, E, F, and G is not excepted from disclosure under section 552.108.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

KAE/er

Ref: ID# 144527

Encl: Marked documents

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